No. 16,461

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARTHUR E. BAKER, DORIS M. BAKER, JOHN L. ROACH and BETTIE JO ROACH,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief for Appellees Arthur E. Baker, et al.

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CITATIONS

TEXTS

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JURISDICTION

Appellees concur in Appellant's statement of jurisdiction and adopt same verbatim herein.

PRELIMINARY STATEMENT

The Government's statement of the case is inadequate for it omits the key evidence in support of the verdict and the circumstances and issues which justified the Court's denial of the two instructions complained of. To fully understand and appreciate the District Court's action, appellees feel compelled to enlighten the Court in this regard.

PHYSICAL FACTS

Luke Air Force Base (L.A.F.B.) lies fifteen miles northwest of Phoenix, Arizona, six miles southwest of Youngtown, Arizona, seven miles west of Glendale, Arizona; and L.A.F.B. and Glendale are connected by Glendale Avenue, an arterial highway which ends at the Air Base. It intersects Litchfield Road, which runs north and south connecting Litchfield, Arizona, approximately three miles south, to the Air Base (R-106). Dysert Road runs north and south and interesects Glendale Avenue one mile east of the Air Base.

Appellees' 510-acre farm consisted of 330 acres on the northwest corner of Glendale and Dysert, 60 acres on the southwest corner, and 120 acres on the northeast corner. The 132.6 acres taken in this proceeding was out of the 330-acre tract fronting on Glendale Avenue, and was the most valuable portion of the farm (R-111). The lands were physically adaptable to residential housing and commercial uses with a developed water supply and an adjacent arterial highway (R-41, 42). The tract taken was outside of the "Noise Clearance Zone," with reference to L.A.F.B., as established by the U. S. Corps of Engineers (R-40). The northwest and southwest corners of the intersection of Dysert Road and Glendale Avenue had, before the date of taking, been zoned for commercial uses by the Maricopa County Planning and Zoning Commission (R-43). The southeast corner of Litchfield Road and Glendale Avenue then was devoted to commercial uses (R-42), as was frontage on the south side of Glendale Avenue, approximately one-half mile east of appellees' farm, to-wit: a trailer court (R-38).

The L.A.F.B. total population on the date of taking consisted of 4,574 persons, including officers, airmen and 1,369 civilian employees. Of these, approximately 2,139 were re-

quired to live off-base in the surrounding communities, as there were not sufficient accommodations at or about the Air Base. There was a demand for housing facilities for these personnel on the date of taking (R-46, 48).

Luke Air Force Base was established during World War II (R-55), but was not declared a permanent Air Force installation until April 7, 1956 (R-47, 82). The Government housing project, for which the appellees' land was taken, was in the planning stage within several months after the Air Base was declared a permanent installation (R-128, 129). A ten-million-dollar expansion program was anticipated at the date of taking (R-87).

TRIAL THEORY OF APPELLEES

First: That the highest and best use, at present or within the reasonably near future, of the land taken was for residential housing and commercial and multiple housing on the Glendale Avenue frontage. Further, that there was a current captive market demand for those uses which commanded a market value of not less than $1,750.00 per acre for the land taken.

Second: That *if* the Government was correct on its theory of *farm values only,* for the land taken, that the remainder farm lands of appellees would depreciate in market value not less than $300 per acre by virtue of the taking: i.e., *severance damages.*

VERDICT

Although appellees' evidence of market value for the lands taken, on the theory of residential housing, ranged from $269,280 to $232,300, the verdict was for $165,500, a far cry from a speculative verdict and indicative of a "thinking man's" jury. The *general verdict* can be accounted for on

either of appellees' theories of the case or the Government's theory of farm values only. For that matter, the jury may have adopted the Government's farm value theory at $700 per acre for the land taken, together with the appellees' claims of severance damage to the remainder farm lands. *The Government's theory on this appeal is that the jury rendered its verdict on appellees' theory of residential values only, and that it allowed no severance damages.* That is an unwarranted and clairvoyant assumption by counsel, based on speculation only, as recognized in *Burnett v. Central Nebraska Pub. P. & I. D.*, 125 Fed. (2d) 836, 838. On Appeal, a verdict should be viewed in the light of those facts most favorable in support of the appellees' theory of the case and which tend to support and justify the verdict.

ISSUES FRAMED BY EVIDENCE

The statement by appellant, on page 6 of its brief, that the second fundamental point of contention was the use or nonuse of comparable sales in arriving at estimates of market value *is erroneous.* The true bone of contention between the experts on both sides was whether or not the other sales in the vicinity were *in fact* comparable and so similar as to be trustworthy as a basis upon which to predicate a professional opinion of market value. The Government witnesses contended that they were in fact comparable and the appellees' witnesses contended they were not. Thus, the opinion of market value of all of the witnesses, having been submitted to the jury, a factual question arose for the jury's determination as to which opinions were the most convincing, accurate and persuasive. By its verdict, the jury obviously determined either (1) that the opinions of value expressed by the appellees' witnesses McGrew, Cavanaugh and Blake were the most convincing and accu-

rate (based upon a highest and best use for housing and commercial purposes), or (2) that although the highest and best use of the land taken was for farming purposes only, the appellees had suffered considerable severance damages to their remaining farm lands, as testified to by witnesses Atha, Blake and Cavanaugh and as recognized by the Government witness Englehorn.

JUSTIFICATION FOR DENIAL OF COMPARABLE SALES INSTRUCTION

In its brief, at page 15, the Government clearly states and admits that the refused instruction on comparable sales related to the *weight* to be given to sales of comparable property *as evidence*. The instruction was refused by the District Court even though appellees made no exception thereto. WHY?

1. The Government did not introduce into evidence any independent, direct evidence of comparable sales. The only evidence offered by the Government of market value was the expert opinions of witnesses Hansen and Englehorn. Accordingly, the witnesses were permitted to testify concerning the factors upon which they based their opinion, and rightly so. 32 C.J.S., Evidence, Sec. 545, pages 292-293; *H & H Supply Co. v. United States* (10 Cir.), 194 Fed. (2d) 553, 556. *But the facts so stated did not become independent evidence. United States v. 5139.5 acres of land,* 200 Fed. (2d) 659, 662. The refused instruction expressly directs the jury to consider as the "best evidence" that which was not and could not be offered *as such* into the record.

2. The opinions of the Government experts and their testimony throughout was in sharp conflict with the experts for the appellees on the question of the reliability and weight to be given the other sales in the vicinity as true and correct guides to current market value. For the court to take sides

and instruct the jury that comparable sales were the "best evidence" would have been a COMMENT ON THE WEIGHT OF THE EVIDENCE. Although the Court may in some circumstances have that prerogative, it is purely discretionary, *Cal-Bay Corp. v. U. S.,* 169 Fed. (2d) 15, 22 (C.A. 9, 1948); and in this case, it would have been a prejudicial comment, *Hickey v. U. S.,* 208 Fed. (2d) 269, *as the weight of the evidence was, under the circumstances, purely and solely a jury question.*

Other sales, dissimilar in time, location, physical adaptability, and not comparable for cogent economic reasons, would not have been proper guides to arrive at an opinion of value. The requested instruction *begged the question* and failed to advise the jury, in a precautionary manner, that it was their province to determine the weight of the other sales testified to by the Government experts and whether the foundation and predicate of their opinions were more expertly considered than those of the landowners' witnesses.

3. The most potent reason, and that which most nearly touches the "heart" of the case at bar, which justified the refusal of the "comparable sales" instruction, was the fact that the sales relied upon by the Government experts were patently dissimilar and economically not comparable to be proper guides to value, and the use of same reflected a biased attitude with an "eyes shut" approach to the problem at hand.

Witness Hansen predicated his opinion of market value on four basic points. *First:* The sales price of the "Rubenstein property" on the southeast corner of Glendale Avenue and Litchfield Road, which took place in 1953 (R-49, 54). The court, on objection of counsel, excluded the testimony as being of no value as too remote in point of time (R-58).

Witness Englehorn also thought it too remote (R-170). *Second:* Several sales of desert land East of the property taken and South of Glendale Avenue, one-fourth mile. It was uncultivated desert land that did not front on Glendale Avenue (the arterial highway), nor did it front on Luke Air Force Base, nor did it have a developed water supply (R-82, 83). The record shows nothing which could even remotely be considered as a justification for reliance upon those sales. *Third:* The apparent failure of what he deemed an attempt to subdivide for housing purposes on Litchfield Road south of Glendale Avenue (R-51). On cross-examination and in the subsequent testimony of Mr. Englehorn and others, it was developed *without contradiction* that the owner merely platted the land into lots and attempted to sell them for housing purposes (R-59). It was not a bona fide attempt to subdivide and develop as is the common practice throughout the nation by means of platting, subdividing, installation of streets and utilities, construction of model homes, and the sale of lots with similar houses built thereon as a package unit with ready-made FHA financing. This factor also was rejected by Mr. Englehorn (R-163). Mr. Hansen admitted he did not consider the fact that this land was within the "noise clearance zone," as possibly being a factor in its failure. To top it off, the land had a wash running through it and the entire effort was prior to L.A.F.B. being declared a permanent Government installation (R-89, 90). *Fourth:* Farm lands in the Adaman District on the West side of L.A.F.B., which were selling at approximately $600 per acre for farming purposes only, were heavily relied upon by both Mr. Hansen and Mr. Englehorn. Careful analysis of the testimony reveals that there was no arterial highway passing by, to, or through the Adaman

district. In fact, the only plausible means of access was to go through Litchfield, which was three miles south of the Air Base, west on Indian School Road, and then north to the Adaman District. Appellees have no quarrel with the values expressed for those particular lands, but insist that they were rightly "rejected out of hand" by appellees' experts simpy because they did not have the *strategic* location, near the entrance to the Air Base, outside of the noise clearance zone, on an arterial highway and on the populated side of the Air Base, as did appellees' lands. They were, in effect, "south of the tracks."

Witness Engelhorn predicated his opinion of market value on the sale of acreage three miles north of Luke Field Air Base on Litchfield Road in Section 4 (R-160, 161) (original transcript 333), which also is on the far side of the populated area of the valley with respect to the Air Base. But he admitted that three miles south of the Air Base there was a successfully subdivided 40-acre tract. Counsel wonders why he went north away from the populated area to make a comparison instead of south. In addition, he relied upon the Adaman District sales, to which appellees make no further comment. He expressly admitted the Adaman lands were not as well located, with a problem of accessibility as compared to the appellees' lands. Further, he admitted the possibility of the subdivision of appellees' lands in the future (R-162, 172).

Despite the flaws in the foundation of the expert opinions of Messrs. Hansen and Englehorn, THE JURY HEARD IT ALL. Little wonder, indeed, that the trial court refused to comment on the weight that the jury should give to the evidence and circumstances supporting the opinions of Hansen and Englehorn.

RESPONSE TO GOVERNMENT'S ANALYSIS OF TESTIMONY FOR APPELLEES

In the Government's "Summary of Argument" it is claimed that appellees' witnesses "relied primarily on their personal experience and familiarity with the area."

This attempt to discount the credibility of the expert opinions of witnesses McGrew, Cavanaugh and Blake is not supported by the record and is a total misstatement of fact.

Witness McGrew, a man of vast experience in the planning and use of real properties in Maricopa County, Arizona, testified that the highest and best use of the land taken was for residential and commercial purposes (R-45). His opinion was predicated upon (1) Luke Air Force Base personnel required to commute to work (R-38), (2) other developments and trends in the area (R-38, 39), (3) outside noise clearance zone (R-40), (4) developed water supply and physical adaptability (R-41), and (5) residential and commercial zoning in effect (R-43).

Witness Cavanaugh, with 38 years' experience in the field of real estate appraising, building, investment, sales and development, testified he had been familiar with the land taken since 1943 (R-97), and was of the opinion its highest and best use on the date taken or within the reasonably near future was that of a housing and multiple unit development with a commercial shopping center (R-101). His opinion was predicated upon: (1) general location and accessibility to highways (R-98); (2) location in area of potential growth (R-98); (3) size, terrain, accessibility to utilities, schools and churches (R-98); (4) strategically located near source of sales market (R-99); (5) enough land held by owners for a builder and developer to make a substantial deal (R-100); (6) commercial zoning on northwest and southwest corners of Dysert Road and Glendale Avenue

(R-100); (7) land taken most valuable holding of appellees (R-100); and (8) stability by virtue of L.A.F.B. having been declared a permanent Government facility (R-105).

Witness Blake, with thirteen years' experience as a professional appraiser, including blocks of acreage for future subdividing in Maricopa County, testified his opinion of highest and best use was for residential purposes on the rear acreage and commercial on the frontage on Glendale Avenue (R-127). His opinion was predicated on: (1) search and failure to find comparable sales in point of time, size and type in the immediate vicinity (R-123); (2) land taken was on east side of L.A.F.B. toward the area of development and not away from it (R-124); (3) physically adaptable (R-124); (4) comparison with sales of lands similarly situated on fringe of other developed area seven or eight miles away with similar demand for housing facilities (R-126); (5) zoning factor (R-127); and (6) demand for housing in the area was sufficient to affect the market value and warrant the immediate development of appellees' lands (R-128).

ARGUMENT

I. First Assignment of Error.

As stated in the Government's brief on page 15, the comparable sales instruction related "to the weight to be given to sales of comparable property *as evidence* * * *". This Court has heretofore reviewed this question in a case practically "on all fours" with the case at bar and appellees submit that it is decisive on both claimed errors on this appeal, to-wit: *U. S. v. Waterhouse,* 132 Fed. (2d) 699 (C.A. 9, 1943). There, as here, the landowners claimed a market value predicated on residential development in the future, whereas the Government contended for cane land values only by virtue of present use. The issue was whether the

landowner's evidence was admissible per se because predicated upon future use, or whether it was a jury question to determine the *weight of the probability and effect* of future use on current market value. The Court held, in construing the law of eminent domain, as set down by the leading decision of *Olson v. U. S.*, 292 U.S. 255, 54 S. Ct. 708, 78 L. Ed. 1236, that:

> "* * * If there is any substantial evidence to show that the adaptability of the lands in question for the uses testified to was 'reasonably probable,' then the evidence was admissible, and it was for the jury to say whether *Such Adaptability Affected the Market Value of the Lands.* * * *" (Emphasis supplied.)

That there is substantial evidence in this record of a "reasonable probable effect" upon the market value by the demand for uses here contended for cannot be questioned. For example:

1. Demand for housing at or near L.A.F.B.
2. Physical adaptability.
3. Adjacent to arterial highway.
4. Outside of noise clearance zone.
5. Government witnesses recognized reasonably probable use for frontage on Glendale Avenue for purposes other than farming.
6. Successful subdivisions seven miles east, three miles south, and six miles northeast.
7. L.A.F.B. declared permanent installation.

Both physical and economic adaptability having been established to a "reasonable probability," *it was for the jury to determine what the best and most reliable evidence of market value was* and not for the Court by the requested instruction. See also, *U. S. v. Meadow Brook Club,* 259 Fed. (2d) 41 (C.A. 2, 1958).

Though the identical comparable sales instruction was not reviewed in the *Waterhouse* appeal, the conclusion arrived at therein answers this question four-square, to-wit: WHOSE PROVINCE IS IT TO DETERMINE THE WEIGHT OF THE EVIDENCE IN DETERMINING MARKET VALUE?

PROPOSITION OF LAW NO. I

When Expert Opinion Evidence Is in Sharp Conflict as to the Degree of Similarity or the Comparability of Sales of Other Lands in the Vicinity, as Guides to Market Value, the Weight of the Evidence Is the Exclusive Province of the Jury.

Conspicuous by its absence from the Government's brief is the federal appellate decision wherein this precise "issue for decision" was presented, analyzed, and determined (favorable to appellees). *Hickey v. U. S.*, 208 Fed. (2d) 269, 273.

> "The point at issue is the relative weight to be given to the recent prior sale of the property condemned and to recent sales of other, comparable property. As between the two, it is the position of the U. S. that a prior sale of the precise property condemned was, as a matter of law, entitled to more weight than sales of comparable property. * * *"

In reviewing the holdings in *Southern Scrap v. U. S.*, 113 Ct. Cl. 129, 82 Fed. Supp. 520, *Baetjer v. U. S.*, 143 Fed. (2d) 391, and *U. S. v. 13,255.53 acres,* 158 Fed. (2d) 874, the court construed them all as only lending authority to the proposition that "in some cases" the Government's principle would be correct but not as a flat rule of law. THE RULE OF THE CASE WAS:

> "* * * The issue presented is peculiarly within the discretion of the trial judge in the light of the facts in each case. * * *"

In the case at bar, the trial judge exercised his discretion by refusing the "comparable sales instruction" and left it to the jury to determine the weight of the evidence upon which the various opinions were predicated.

Squarely in point in support of this proposition is *U. S. v. 679.19 acres of land, et al,* 113 Fed. Supp. 590, wherein the Government contended that the entire weight of the evidence should be placed on valuations found by its experts in that they prefaced their findings upon alleged comparable sales. The landowner's witnesses denied that the sales were comparable and, in turn, used other evidence and factors upon which to predicate their opinions of value. The issue was the *weight* to be given the testimony, and the Court held *that it was a question for the jury and relied upon the rule set forth* in *U. S. v. Ham,* 187 Fed. (2d) 265 (C.A. 8, 1951). It was pointed out that the jury must consider both sides and weigh the evidence and that it was "IMPROPER TO SET ASIDE A JURY VERDICT WHERE BOTH SIDES OF THE QUESTION WERE BEFORE IT," which was the precise rule adopted by *this* court in *Simmonds v. U. S.,* 199 Fed. (2d) 305, 307, as follows:

> "The jury heard expert testimony submitted by both sides. The experts varied in their estimates from $300 per acre to $26,000 per acre, depending upon whether they considered the property to be best suited for commercial or residential purposes. * * * Nevertheless, the jury heard the conflicting testimony by qualified experts on both sides and reached a finding which is supported by substantial evidence. *Since the question of credibility is for the District Court and the award is within the range of the testimony, the award cannot be set aside on appeal. Porrata v. U. S.,* 1 Cir., 1947, 158 Fed. (2d) 788, 791. * * *" (Emphasis supplied.)

The *Ham* case does not stand for the proposition contended for by the Government on page 16 of its brief. In

that case, the trial judge *excluded* the Government's evidence of other sales and upon *that ground* was reversed. Having refused the evidence of other sales, the District Court refused to give an instruction that the jury should "take into account and consider what land in the neighborhood was being sold for at the time of taking." *There was no requested instruction that comparable sales were the "best evidence."* But interesting indeed was the Court's ruling concerning the *weight* of the evidence and whose province it was to try and determine the same:

> "* * * To fairly try the issue and determine just compensation in this case, it was necessary for the jury to consider both sides of the dispute and to *weigh the evidence of use value which tended to enhance compensation for the taking against the evidence of the sales value which tended to diminish it, and the duty rested on the court to conduct the proceedings of the trial to obtain fair and impartial consideration of both sides.* * * *" (Emphasis supplied.)

Although the Government relies heavily upon *U. S. v. 5139.5 Acres of Land,* 200 Fed. (2d) 659 (C.A. 4, 1952), it is not decisive or persuasive of the claimed error. There again, the District Judge refused to *admit into evidence* sales of similar land upon which the Government expert predicated his opinion of market value. The judgment was reversed on *that* defect, in the rejection of the evidence, and not because of the denial of the "best evidence" instruction, to-wit:

> "* * * We do not think that prejudicial error can be predicated on its refusal, however, because no evidence had been admitted of recent sales of similar parcels. * * *"

It is true that the Court went on to say:

> "If, upon the new trial which is being granted, such evidence should be introduced, such instruction would be proper. * * *"

but the instruction referred to *was not* a request that the Court instruct the jury that comparable sales were the "best evidence." There was *no issue* of the degree of comparability of the other sales, but rather, the trial court simply refused to admit such testimony.

Persuasive and well considered authority in support of appellees' proposition is found in *Welch v. Tennessee Valley Authority,* 108 Fed. (2d) 95 (C.A. 6, 1939), Cert. Den. 309 U. S. 688, wherein the court held that where there is a wide diversity in the testimony of different witnesses as to the value of the property in question, consideration must be given to the different theories upon which they are based:

> "* * * The triers of the facts who saw and heard the witnesses were the best judges of the value, *weight* and credibility of their testimony and could best weigh the evidence. * * *" (Emphasis supplied.)

True, the court stated that sales at arm's length of similar property are the best evidence of market value but, THE COURT WAS NOT RULING upon a rejection of such an instruction as we are dealing with here, and the facts in that case reveal that the state of the evidence was identical with that of the case at bar in that the "wide diversity" was resolved by the jury and the *judgment was affirmed.*

The Government finds comfort in and cites as authority *U. S. v. Lowrie,* 246 Fed. (2d) 472, 474 (C.A. 4, 1957), wherein the Court recognizes that:

> "* * * The Court in many cases will be deprived of one of the most persuasive indications of market values and one of the most reliable checks upon expert opinion. * * *"

but *no mention is made* of the "meat of the nut" of that case, to-wit:

> "* * * that an expert witness is always subject to cross examination, which may well be devastating, when it is

> shown that the properties to which he refers are so dissimilar as to furnish no adequate basis for comparison. The exercise of the Court's discretion should be made with these considerations in mind. * * *"

So, here, the cross-examination of witness Hansen was "devastating" to the Government's case and thoroughly undermined the professional nature of his expressed opinion by the revelation that he failed to recognize and appreciate the effect of the "crop-dusting and noise clearance zone" problems, which doubtless would occur to any prospective purchaser of the remainder farm lands of appellees. The trial judge exercised his discretion under the directive set forth in the *Lowrie* case and permitted all of the Government's evidence to be considered by the jury, but refused to give a directive concerning these alleged comparable sales that would indicate the Court's preference to the appraisal method adopted by the Government witness. To do so could have been no more devastating to the appellees' case than a directed verdict for the Government.

The jury may deal with opinion evidence as they please, giving credence or not as their own experience or general knowledge of the subject may dictate. *The Conqueror,* 166 U.S. 110, 131, 17 Sup. Ct. 510, 518, 41 L.Ed. 937. And so an eminent domain proceeding, where the opinions of market value are conflicting with great diversity, the appellate rule is clearly stated in *U. S. v. 2.4 acres,* 138 Fed. (2d) 295, (C.A. 7, 1943) as:

> "* * * Where the different theories and processes submitted by witnesses for ascertaining the value of property taken lead to widely differing results, and the opinions of the witnesses themselves are conflicting and wholly irreconcilable, and there is sufficient evidence upon which the verdict may be sustained, *the verdict will not be disturbed* unless it is manifest, from all the

circumstances in the case, that the jury adopted a false theory in arriving at their conclusion. * * *"

See also *Samuelson v. Central Nebraska P.P. & I.D.*, 125 Fed. (2d) 838 (C.A. 8, 1942).

Analogous to the issue at bar is the holding in *U. S. v. Meyer*, 113 Fed. (2d) 387 (C.A. 7), that voluntary character of other sales in the vicinity went to the weight of the evidence and was a jury question.

II. Second Assignment of Error.

This requested, but denied, instruction was predicated on the assumption by counsel (1) that the Capehart housing project was "purely governmental" in that its character, scope, and size was such that it could not be undertaken by private business; (2) the project came into existence because private industry had refused to commit private funds for a housing project; (3) that the enhancement in value was created by government needs alone; and (4) that there were no severance damages to the remainder-lands of appellees caused by the *use* to which the government was going to devote the lands taken.

This entire line of reasoning is based on facts not in issue or even in the record, together with an assumption in the government's favor of facts obviously decided in appellees' favor by the jury.

The government contends that "the land must be valued in its present condition: i.e., farm land, with a probability of commercial development" and argues that appellees' witnesses appraised the land "in a status which assumed that the probability of development had reached the level of actuality." THE IDENTICAL POINT WAS RAISED AND REJECTED in *U. S. v. Waterhouse, Supra*, ON A SET OF FACTS VIRTUALLY ON ALL FOURS WITH

THOSE AT BAR. The Court quoted the Government's argument (page 702) as

> "* * * that 'the prospect that agricultural land may be profitably subdivided for dwelling, business and truck garden sites, *does not make it as valuable as an existing subdivision*' * * *" (Emphasis added.)

and recited the landowners' argument as

> "that just compensation should include any enhancement in the value of the lands taken arising from the prospect that they *could* profitably be subdivided." (Emphasis added.)

In analyzing the government's argument, the court forcefully stated:

> "Appellant's argument is based on the assumption that appellees' witnesses were testifying as to what price the land would sell for if subdivided. * * * The effect of that argument is that such witnesses were testifying not as to present value but as to some future value. The record gives no support to that argument, but, in fact, shows that the witnesses were testifying as to the value of the land in November, 1940. * * *"

In the case at bar, appellees' witnesses were asked, and answered, concerning the opinions of market value as of the date of taking, to-wit: March 11, 1957. They all predicated their opinions of value upon what a willing buyer would have paid a willing seller on that date and not by assuming any "future status as claimed by the government. As heretofore stated in this brief, the *Waterhouse* decision answers both the comparable sales instruction and this phase of the second assignment of error.

The government argues that the Capehart housing project was "inadmissible" for the purpose of showing demand and market value. The proposed use of the lands taken was only incidentally referred to at the trial and not intro-

duced, contended for, or argued, as evidence of market value. *The United States Attorney himself moved the court for a jury view,* without mention of specific purpose or qualification. (R-131)

> "Mr. Eubank: May the record show that the government has moved the court for a jury view of the condemned real property and the property surrounding the taking, and that counsel for the defendant had no objection. * * *"

Counsel would have the jury *look but not see.*

The government further argues, by way of rationalization, that because private industry had not constructed a housing project on the land taken, it had "refused" to accept the financial risk. The doctrine of *Boom Co. v. Patterson,* 98 U.S. 403, and *U. S. v. Chandler-Dunbar,* 229 U.S. 53, is then invoked to support the proposition "that demand cannot be shown by the government's activities." True, appellees' land had not yet been developed into a housing project, but it must be remembered that L.A.F.B. was not declared a permanent installation until April 7, 1956. The record shows that shortly thereafter (R-129) the Capehart project was general knowledge in the community. Appellees did not refuse; they never had a chance to take advantage of the newly created economic stability in the area. The government beat them to it. To say that private industry could not have financed a housing project to meet the demand created by the presence of a "permanent military installation" is nothing less than ridiculous. Nor was there any evidence in the record to that effect other than the ramblings of the inexpert Mr. Hansen.

The government would deprive appellees of the "totality of possible uses" doctrine emphasized by this court in

Phillips v. U. S., 143 Fed. (2d) 1 (C.A. 9, 1957), and the benefit of the "link in the chain of proof" rule set down in *McCandless v. U. S.*, 298 U.S. 342, 346, 56 Sup. Ct. 764, 766.

PERTINENT JURY INSTRUCTIONS

The jury was carefully instructed, out of an abundance of caution, on this very point.

> "* * * You are not to consider the price a tract of land would sell for under special or ordinary circumstances. * * *" (R-179)
>
> "* * * It is not, therefore, a question of the value of the property to the defendants or a question of the *value of the property to the government.* * * *"
>
> "* * * In applying the market value standard, no account is to be given to values for necessities peculiar to the defendant *or the government.* But consideration should be given only to such matters as would affect the ordinary willing buyer and seller in negotiating a fair price." (Emphasis added.) (R-182)
>
> "You are not to consider any personal loss or gain to either party." (R-185)

As clearly shown above, the instruction relied upon by the government and approved by this court in *Poulson Logging Co. v. U. S.*, 160 Fed. (2d) 712, 717 (C.A. 9), was given in toto in this case.

At the close of the government's argument on page 21 of its brief, there is asserted and cited in support of the second assignment of error the leading federal decision on the law of eminent domain, *United States v. Miller,* 317 U.S. 369, 63 Sup. Ct. 276. The only new law clearly set down in that case may be paraphrased as

PROPOSITION OF LAW NO. II

A Landowner Whose Property Is Condemned Is Entitled to Any Enhancement in Value Created by a Nearby Government Project if the Lands Taken Were Not Included or Contemplated in the Original Government Project.

which is exactly *the opposite* of that claimed in the Government's brief. If the Government project creates an enhancement in value, *it must pay*, unless under the facts the exception applies.

APPELLEES CHALLENGE THE GOVERNMENT TO POINT OUT IN THE ENTIRE RECORD, DESIGNATED ON APPEAL OR NOT, ONE SCINTILLA OF EVIDENCE THAT APPELLEES' LANDS WERE "CONTEMPLATED" IN THE ORIGINAL PROJECT, to-wit: L.A.F.B.

The *Miller* and *Cors* rule of fairness is a two-edged sword which counsel has misinterpreted. In *Scott v. U. S.*, 146 Fed. (2d) 131 (C.A. 5, 1944), the applicable rule of law was extracted from the *Miller* decision and applied to resolve the identical question on a set of facts very similar to those at bar, wherein the court stated:

> "* * * The question then is whether the respondents' lands were properly within the scope of the project from the time the government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them should not deprive the respondents of the value added in the meantime by the proximity of the improvement. * * *"

SEVERANCE DAMAGES

To have given the refused instruction would have constituted prejudicial, reversible error upon a ground *delicately* overlooked by the Government. All of the experts except Mr. Hansen agreed on *one thing*, to-wit: the incurrence of severance damages to appellees' remaining lands. There was a

wide diversity of opinion among the experts as to the depreciation in market value to said remaining lands by virtue of the taking. It is impossible to determine from the general verdict how much, if any, was allowed. Nevertheless, the issue was clearly framed in the pleadings (R-12) and in the evidence. *The Government's requested instructions* on severance damages were given (R-18, 19).

The evidence of severance damages was very clear and certain. Witness Englehorn, for the Government, allowed $9,000 in his opinion of market value, which, spread over the remaining 377.6 acres, would be an average of approximately $25.00 per acre. Witness Atha allowed $300.00 per acre, and witness Cavanaugh $400.00 per acre.

Vital at the trial was the issue of crop dusting the appellees' remaining farm lands. Except Mr. Hansen, all the experts agreed that to crop dust by airplane with poisonous, organic chemical sprays such as parathion, adjacent to a housing project, was an inherently dangerous undertaking. *Witness Atha,* for appellees, the state manager for J. G. Boswell Company, a 16,000-acre farming and ginning operation, and also a neighboring landowner to appellees, *Cal-Bay Corp. v. U. S., supra,* testified that good crops could not be raised without airplane crop dusting when the cotton got tall in July and August (R-145).

It does not take an expert to tell a jury that the prospective and proverbial willing buyer of appellees' remaining farm lands would heavily consider this crop dusting feature in deciding what he would be willing to pay, when there are other farm lands without the same problem. *The point is,* it was the very fact that the Government was building houses on the lands taken that created the severance damage (although the record is replete with other physical factors of damage) (R-71, 131, 147, 156, 165).

Query: How can the jury measure and assess severance damage caused by the housing project if they are instructed to disregard the use of the lands taken?

PROPOSITION OF LAW NO. III

Severance Damages Include Those Caused by the Use of the Property for the Purpose for Which the Condemnation Is Made.

Appellees submit that the overwheming weight of authority supports this proposition of law as set forth in *Sharp v. U. S.*, 191 U.S. 341, 24 Sup. Ct. 114, 117, 48 L.Ed. 211, wherein the rule was clearly stated as:

> "* * * If the remaining land had been part of the same tract which the government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the *probable use thereof by the government,* would be a proper subject of award in these condemnation proceedings, * * * " (Emphasis supplied.)

and this court has heretofore heavily relied upon the rules governing severance damages as recited in the *Sharp* case. *Cole Investment v. U. S.*, 258 Fed. (2d) 203 (C.A. 9, 1958). Although the issue was not directly before the Supreme Court in the *Sharp* case, it was in *U. S. v. Archer,* 36 Sup. Ct. 521, 531,

> "* * * It is an established rule, recognized everywhere, that where only part of a tract of land is taken, the owner is entitled not merely to the market value of the part taken, but to all damage to the remainder of his tract *proximately resulting from use made of the part actually taken.* * * *" (Emphasis added.)

In the *Archer* case, the dictum rule of the *Sharp* case was adhered to and relied upon together with *U. S. v. Grizzard,* 219 U.S. 180, 31 Sup. Ct. 162, 55 L.Ed. 165, where the rule is stated as:

> " * * * Since, therefore, there has been a taking of part of the owner's single tract and damage has resulted to the owner's remaining interest by reason of the rela-

> tion between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case. * * * The compensation to be awarded includes not only the market value of that part of the tract appropriated but the damage to the remainder resulting from that taking, *embracing, of course, injury due to the use to which the part appropriated is to be devoted.* * * *" (Emphasis added.)

This doctrine is adhered to by the able authors of Lewis, Eminent Domain, 3rd ed., sections 686 and 710, and Nichols on Eminent Domain, 3rd ed., section 14.232, page 325, 338, n. 9. See also *Bauman v. Ross,* 167 U.S. 548, 17 Sup. Ct. 966. For a circuit court decision squarely in point, see *West Virginia Pulp & P. Co. v. U. S.,* 200 Fed. (2d) 100.

The use of the land taken as a housing project has seriously jeopardized the appellees' future farming operation on their remainder lands, as crop dusting will be next to impossible. The jury was entitled to consider that factor in fixing damages; thus the instruction that the jury was not to consider the *use* being made of the land taken by the Government was justly refused.

SUMMARY AND CONCLUSION

This case was fairly tried and submitted to the jury. The verdict was reasonable and within the scope of the evidence. The court's instructions protected the rights of both the Government and the appellees with great nicety. The court exercised its discretion in permitting the jury to determine what the "best evidence" was in support of the expert opinions. Further, the court recognized "proximity value" inherent in appellees' lands and for that reason, together with the severance damage issue, permitted the jury to consider the proposed use of the lands taken as an element of damage.

The judgment reflects all elements of value which logically might be considered in determining the issue of just compensation. Both the government and appellees have had their day in court. It is respectfully submitted that no errors of law were committed by the trial court which would warrant a reversal. The judgment should be affirmed.

Respectfully submitted,

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